

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN CEDRIC KING,

Defendant-Appellant.

UNPUBLISHED
November 2, 2006

No. 263046
Wayne Circuit Court
LC No. 05-001351-01

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, discharge of a firearm toward a building, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of 35 to 70 years for assault with intent to commit murder (enhanced for third habitual offender status, MCL 769.11), 2 to 5 years for felon in possession of a firearm, and 2 to 4 years for discharge of a firearm toward a building. Defendant was also sentenced to a consecutive mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right and we affirm. We decide this appeal without oral argument in accordance with MCR 7.214(E).

Defendant first argues on appeal that the evidence was insufficient to establish that he was the perpetrator. Defendant notes that despite her identification of him at trial as her assailant, the complainant originally told a 911 operator that her husband had shot her. Also, he asserts that she was not a credible witness because she had smoked marijuana and had consumed brandy earlier on the evening of the assault. Further, he points out that police did not find the gun used in the assault or any bloody clothing in defendant's residence when he was arrested. Moreover, defendant argues, gunshot residue tests did not reveal dispositive evidence that gunshot residue was on him.

This Court reviews sufficiency of the evidence challenges de novo. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992).¹ In reviewing such a challenge, the evidence is viewed

¹ Amended on other grounds 441 Mich 1202; 489 NW2d 748 (1992).

in the light most favorable to the prosecution to determine whether a rational trier of fact was justified in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). Determining the weight of the evidence and credibility of witnesses is the role of the finder of fact. *Wolfe, supra* at 514.

The complainant positively identified defendant at trial as the person who shot her. A positive identification by the victim of a defendant as being the perpetrator is enough to establish identity beyond a reasonable doubt. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Although the complainant may have been under the influence of intoxicants at the time of the offense, we defer to the trial judge's assessment that she was nonetheless credible. See *Wolfe, supra* at 514.

Although it is true that the complainant initially told a 911 operator that her husband had shot her, she testified that she did this because defendant was still in the room when she placed the call, and she was fearful that he would shoot her again if she told the truth. Moreover, the trial judge noted that the complainant could be heard on the 911 tape talking to an individual she identified as "Adrian." She also told the police officers responding to the scene that defendant shot her, correcting, at the earliest opportunity, her previous statement to the 911 operator. Further, the failure to find the gun used, bloody clothing, or any gunshot residue was not significant given the time that passed between the assault and defendant's arrest. Defendant had ample time during this period to dispose of the gun and clothing and to wash away any gunshot residue.

Defendant next argues that the court erred in scoring offense variable (OV) 7 at 50 points. We disagree. OV 7 is for aggravated physical abuse. Fifty points are scored when "[a] victim is treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a).²

Defendant's seems to argue that his conduct was not intended "to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Specifically, defendant argues that a score of 50 points was not justified because the assault took place over a short period of time in a darkened room, and because defendant did not verbally threaten the complainant while holding the gun. However, in rendering his decision, the trial judge focused on excessive brutality as the reason for giving the 50 points for OV 7. The term "excessive brutality" is not statutorily defined. "When terms are not expressly defined by statute, a court may consult dictionary definitions." *People v Spann*, 250 Mich App 527, 530; 655 NW2d 251 (2002).

² Defendant's argument conflates two versions of OV 7. First, he provides the current version of § 37(1)(a), which no longer includes the term "terrorism." Second, he quotes § 37(2)(a) and (b) from the version that predated the 2002 amendment. See 2002 PA 137. The pre-2002 version of the statute does not apply to this conviction and sentence. This error, however, is not dispositive of this appeal, given that the 2002 amendment essentially replaced the word "terrorism" with the definition proved for in the prior § 37(2)(a).

“Excessive,” as defined by *Random House Webster’s College Dictionary* (1997), is “going beyond the usual, necessary, or proper limit or degree; characterized by excess.” “Brutality” is defined as “the quality of being brutal; cruelty; savagery.” *Id.* Thus, in context, the term “excessive brutality” recognizes first that brutality is often a characteristic of crimes against a person, and second that a defendant can go “beyond the usual” level of brutality in committing such a crime.

In this case, defendant’s actions were well beyond the usual or what was necessary to commit assault with intent to commit murder. He shot the complainant five times, the first shot striking her face. This came after beating her in the face with enough force to knock out her dentures. Defendant also shot the complainant in the back. As a result of the shooting, the complainant suffers from paralysis in her the lower right back. Both the circumstances of the assault and the extent of the complainant’s severe injuries support the conclusion that the assault was “excessively brutal.”

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly